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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 171 F. Supp. 720 (R. 79–94). The opinion of the court of appeals is reported at 267 F. 2d 808 (R. 101–108).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1959 (R. 109). The petition for a writ of certiorari was granted November 16, 1959, 361 U.S. 893 (R. 110). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1957 authorizes the United States to secure equitable relief against a State in order to remove discriminations against Negro citizens unconstitutionally denied the right to vote.

2. Whether, in order to secure the federal voting rights guaranteed by the Constitution and the Civil Rights Act of 1957, voting registrars alleged to have violated such rights may be named as parties defendant where they have purportedly resigned from office and their successors have not been appointed.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States:

> AMENDMENT XV, SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. 1971):

> (a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude;

any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

* * * * *

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

(d) The district court of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Part V of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 638, 42 U.S.C. 1995):

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however,* That in case the accused is a natural person the fine to be paid shall not exceed the sum of $1,000, nor shall imprisonment exceed the term of six months: *Provided further,* That in any such proceeding for criminal contempt, at the discre-

tion of the judge, the accused may be tried with or without a jury: *Provided further, however,* That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

STATEMENT

On February 5, 1959, the United States filed an action under Part IV of the Civil Rights Act of 1957 (42 U.S.C. 1971, *supra,* pp. 2–3) against the Board of Registrars of Macon County, Alabama, and against Grady Rogers and E. P. Livingston, as individual members thereof (R. 1–12).

The complaint alleged that certain acts and practices of the respondents deprived citizens of the United States and of the State of Alabama of their right to vote because of their race and that such deprivations constituted violations of the Fifteenth Amendment and of 42 U.S.C. 1971(a) (*supra*, pp. 2–3). In 1958, white citizens of voting age in Macon County, Alabama, numbered approximately 3,100 and Negro citizens of voting age approximately 14,000. About 97 percent of the white citizens of voting age were registered to vote, whereas only about 8 percent of the Negroes were so registered. The complaint alleged that this disparity was brought about and was being perpetuated by the racially discriminatory acts and practices of the defendants (R. 3).

Among these illegal acts and practices were (*a*) the maintenance of separate, segregated registration facilities for Negroes; (*b*) the failure to convene and function as a board of registrars to avoid receiving applications to register from Negroes; (*c*) the maintenance of irregular and unreasonable hours to avoid receiving and processing applications to register from Negroes; (*d*) the application of different and more stringent standards to Negro than to white applicants; (*e*) the following of a policy of delaying the admittance of Negroes, but not of white persons, to the registration office; (*f*) the closing of the registration office provided for Negro applicants while registering white applicants elsewhere; and (*g*) the use of other evasive schemes to avoid receiving and processing applications to register from Negroes (R. 3–5).

The complaint further alleged that the registration board, for the purpose of preventing Negroes from registering, had become inoperative during long periods of time from 1946 to the present (R. 4–5); that the latest paralysis of the board had occurred in December 1958, as a result of the "purported resignation" of respondents Rogers and Livingston, and this paralysis continued at least to the date of the complaint (R. 3, 5); and that the board had refused, for reason of race and color, to register twenty qualified Negro citizens named in the complaint (R. 6–9). Of these twenty persons, twelve hold college degrees, including one who has a doctor of philosophy degree from Boston University and one who has a master of science degree from Columbia University. The others are high school graduates, of whom four are graduate nurses, and one has completed three-and-one-half years toward a degree at Tuskegee Institute (R. 6–7). The complaint sought a declaratory judgment of the illegality of the specified acts and practices and an injunction to prevent future discrimination (R. 7–8).[1]

[1] Subsequently, on February 12, 1959, the United States filed ancillary motions for the discovery of certain records relating to voting registration in Macon County and for a temporary restraining order preventing the destruction of such records (R. 16–24). The United States contended that a restraining order was necessary because the Alabama Senate had passed a bill on February 11—which later became law on February 24 (17 Ala. Code 31)—permitting voting registrars to dispose of records pertaining to unsuccessful applicants as they saw fit (R. 22–24). The district court issued the temporary restraining order on February 12.

On February 23, 1959, the complaint was amended to include the State of Alabama as a party defendant. The amendment alleged that the State "has, for reasons of race or color, persisted in acts and practices which deprive Negro citizens * * * of their rights to vote," and has, acting through its agents and officials, including the Board of Registrars and the two named individual defendants, "engaged in the discriminatory and unlawful practices" specified in the original complaint (see *supra*) (R. 49–50). The amendment sought a judgment declaring that these acts and practices were illegal and enjoining the State "from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court" (R. 50).

The State and the individual defendants filed separate motions to dismiss (R. 46, 68). The State of Alabama urged that the Civil Rights Act of 1957 authorized suit only against "persons" and that the State is not a person within the meaning of that Act.[2] Defendants Rogers and Livingston urged that, since

[2] The motion also raised over fifty other grounds, among them that the States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments, that the Supreme Court has original and exclusive jurisdiction in cases involving a State, and that Part IV of the Civil Rights Act of 1957 is unconstitutional (R. 68–76). The district court rejected the first two of these contentions (R. 90–92), but refused to decide whether Part IV was constitutional because such a determination was not necessary to its disposition of the case (R. 92).

they had resigned the office of registrar, the court did not have jurisdiction as to them (R. 47); that the registration board was not a suable legal entity; and that "'The Board of Registrars of Macon County, Alabama,' is in law and in fact the State of Alabama" (R. 46).[3]

The district court dismissed the complaint as to all the defendants. Despite the finding that the resignations of Rogers and Livingston were submitted during "a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers" (R. 82), the court concluded that the resignations were effective and that accordingly Rogers and Livingston could not be sued "in their capacity as registrars of Macon County, Alagama" (R. 83). The court further held that the Board of Registrars was not a suable legal entity (R. 87–89), and that the Civil Rights Act of 1957 did not authorize the Attorney General to bring an action against a State (R. 92–94). The court of appeals affirmed on all grounds (R. 101–108).

SUMMARY OF ARGUMENT

This action was brought against the State of Alabama, the Board of Registrars of Macon County, and two registrars of that Board under subsection (c) of 42 U.S.C. 1971. Subsection (c) was enacted by the Civil Rights Act of 1957 to enforce subsection (a), which guarantees the right to vote against any dis-

[3] Since the motion was filed before the amendment to the complaint, these defendants also urged that the State of Alabama was an indispensable party (R. 47).

crimination because of race or color. The district court dismissed the action, and the court of appeals concurred, on the grounds that the Act did not authorize suit against a State, the Board of Registrars was not a suable entity under Alabama law, and the registrars had effectively resigned under Alabama law before the action was brought. Thus, under the holdings of the courts below, the United States is without remedy to prevent the long-continued discrimination in Macon County, which unconstitutionally deprives Negro citizens of their right to vote.

I

The court of appeals held that the Civil Rights Act of 1957 did not authorize the Attorney General to bring an action for injunctive relief against a State to vindicate the right of citizens to vote without distinction of race or color. This view was predicated primarily upon the presumption applied by the court that the federal courts cannot assume jurisdiction over a State unless the applicable statute expressly or by "unavoidable" implication confers such jurisdiction. This standard was clearly erroneous.

A. The language and history of subsection (a), which was enacted in 1870, demonstrates that Congress intended this provision to restate and implement the Fifteenth Amendment. Subsection (c) provides machinery for the enforcement of subsection (a). The Fifteenth Amendment, by its express terms and by judicial interpretation, prohibits deprivations of voting rights by the States. Thus, it seems clear that, absent any evidence to the contrary, it must be

presumed that Congress intended subsection (c) also to apply to the States.

B. The language of the statute indicates that Congress intended to reach the States. The wording of statue not only shows a clear intent to implement fully the Fifteenth Amendment, but it also does not even suggest any exemption as to the State. While subsection (c) allows the Attorney General to bring an injunction action when "any person" has deprived another person of his voting rights, it does not state that the action for injunctive relief must be brought against a "person." The statute merely states that the Attorney General may bring "a court action or other proper proceeding for preventive relief" without making any further limitation.

C. It is well established that whether or not States are within the reach of Federal statutes depends upon the legislative environment and purpose. The legislative history of the Civil Rights Act of 1957 reflects an attempt on the part of Congress to give full vitality to the protection of the Fifteenth Amendment and to safeguard the right to vote against interference from any quarter. Indeed, that history demonstrates that Congress expected the Civil Rights Act to solve the particular problem involved here—the resignation of voting registrars in order to prevent the registration of Negro voters. Thus, Congress clearly intended to include the State within the operation of the statute.

D. Finally, even if it be assumed, *arguendo,* that Congress did not clearly express its purpose to reach the State, such intention should be presumed in the absence of convincing legislative history indicating a

contrary purpose. The rule, deeply rooted in the common law and uniformly followed by this Court, is that remedial statutes which are enacted to prevent injury and wrong bind the sovereign even if he is not specifically named. The Civil Rights Act is designed to protect against deprivations of a basic right under a constitutional provision which speaks of the State and its actions. Since there is a total absence of any indication that Congress intended to exempt the States, this remedial statute should not be construed to reach so paradoxical a result, especially since this construction might well leave the United States powerless to redress flagrant and continuing violations of fundamental constitutional rights.

II

Whether or not the State is a proper defendant in an injunction action brought under Section 1971(c), the action was properly brought against the individual defendants. Even if their resignations were effective under state law, the registrars were nonetheless amenable to suit for violations by them of the Civil Rights Act of 1957. The remedial purpose of the Act, and the broad powers conferred on the Attorney General by subsection (c) to secure preventive relief, justify bringing an action against registrars who have themselves deprived citizens of their rights under the Act and the Fifteenth Amendment, even though they have submitted resignations effective under state law, when the State has failed to appoint new registrars to take their place. The federal courts have ample powers to prevent frustration of the high purposes of the Act by considering the resignations

as ineffective for the limited purpose of holding the registrars as proper defendants under the Act.

A. Since the action was brought under a federal statute, the issues here must be determined by reference to federal law. It is well established that federal law will be applied to effectuate the purposes of federal legislation and protect federal rights, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176, particularly in actions brought in equity. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395. In fashioning the proper federal law, consideration should be given not only to the common law but to the Constitution, federal statutes, and their underlying policies.

At common law, the resignation of a state official became effective upon acceptance by the appointing authority. This rule fully protected the people of the State, to whom the appointing authority was responsible. Where, however, the United States sues under an Act designed to protect rights guaranteed by the Constitution, substantial federal interests are directly involved. For purposes of such an action the State appointing authority, which is not responsible to the national electorate, cannot, by the act of acceptance, validate resignations tendered by subordinate officials who are charged with violations of their federal constitutional and statutory duties.

The appropriate rule, in light of the Constitution and the Civil Rights Act, is that the resignation of a voting registrar is not effective for federal purposes until his successor has been qualified. This is the rule which this Court and other federal courts, in construing conflicting or ambiguous local statutes,

have uniformly and deliberately adopted in order to avoid a hiatus in public office. Applying this principle to the instant case in order to avoid a hiatus which would defeat important federal rights, the registrars' resignations were not effective for purposes of an action brought under the Act and they are proper parties defendant.

B. In any event, the complaint alleged that the individual defendants' purported resignations were made in bad faith for the purpose of avoiding their constitutional duty to register qualified Negroes. It is clear that at common law the resignation of a public official is not effective if its purpose is to avoid the performance of a duty. This rule is fully consistent with federal law and policy, and its application is particularly imperative where the obligation sought to be avoided is one imposed by the Constitution.

The district court, on the basis of affidavits submitted by the defendants, found that their purported resignations were made in good faith. This determination, however, was clearly erroneous. A complaint may not be dismissed without giving the plaintiff an opportunity to offer evidence supporting his allegations "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45–46. The allegations of the complaint here raised a material issue of fact; if proved, they would have rendered the purported resignations ineffective at least for purposes of suit under the Act.

ARGUMENT

INTRODUCTION

This suit was brought by the Attorney General pursuant to 42 U.S.C. 1971(c), *supra*, p. 3, which authorizes actions to secure injunctive relief against deprivation of the rights secured by subsections (a) and (b) of that section. Subsection (a), here involved, which was originally enacted in 1870, guarantees that all qualified United States citizens shall be entitled to vote without distinction of race, color, or previous condition of servitude. Until 1957 this subsection had no direct enforcement provision. Subsection (c) was added by the Civil Rights Act of 1957 in order to provide specific remedies for the deprivation of the rights declared in subsections (a) and (b).

Since enactment of the Civil Rights Act of 1957 the United States has brought a number of actions against voting officials to correct and remedy discriminatory administration of state election laws. Two of these cases are presently pending before this Court. *United States* v. *Raines*, No. 64, this Term; *United States* v. *Thomas*, No. 667, this Term. The complaint in the instant case named as defendants specific state officers and the State of Alabama itself. The courts below held that the officials could not be sued because they had resigned and that the State was not suable under the Act. The following background facts may illuminate the problem before the Court.[4]

[4] These facts are taken from the Report of the Commission on Civil Rights, 1959 (U.S. Govt. Printing Office), pp. 75–92.

In 1950, Macon County Alabama, had a population of 30,561, of whom 25,784 were Negroes and 4,777 were whites. The 1958 voter registration lists, on the other hand, showed 3,102 white voters and only 1,218 Negroes. This disproportion exists in spite of the fact that Macon County ranks first in Alabama in the proportion of its Negroes aged 25 or over who have at least a high school education, and in the percentage of Negroes who hold college degrees. Moreover, Macon County is the seat of the Tuskegee Institute which has been outstanding in the field of higher education for Negroes since it was founded in 1881 by Booker T. Washington.

Macon County Negroes have brought numerous court actions to become registered. After one suit in 1946, all the members of the Board of Registrars of the county resigned and no board functioned publicly for about eighteen months. A new board was formed in January 1948, but no public notice of its existence was given until about four months later, when the resignation of the chairman became known. Scores of Negroes then appeared at the courthouse in Tuskegee to apply for registration. But courthouse officials refused to tell the Negroes where they might find the board. Only when a very fair-complexioned Negro asked the directions was the information provided. On that day, eighteen Negroes applied for registration. The board did not function publicly again for eight months. It again became inoperative for about sixteen months in 1956–1957. And in December 1958, while the Commission on Civil Rights was investigating discriminatory denials of the right to vote in Macon County, the board again became

inoperative by the purported resignations of its only two members.

This technique of vanishing registrars—which has occurred elsewhere in Alabama as well (see *Sellers* v. *Wilson,* 123 F. Supp. 917 (M.D. Ala.))—was only one aspect of the pattern of discrimination in Alabama as a whole and particularly in Macon County. In February 1959, while the present case was pending in the district court, Alabama enacted legislation which provided that registration records are not public records, and that registrars could dispose of the records pertaining to unsuccessful applicants. 17 Ala. Code 31. In effect, this provision permits the destruction of the principal source of evidence in any case which seeks to vindicate the right to vote. In July 1957, a statute was enacted which redistricted the City of Tuskegee to exclude the Negro areas and thus bar Negroes from voting in city elections. Act No. 140, 1957 Sess.[5] And Act No. 526 of that same session proposed a constitutional amendment, which was approved by the voters in December 1957 (Ala. Constitution, Amendment 132), whereby the legislature is empowered to enact laws abolishing Macon County—the effect of which would be to keep political power from the Negro voters of that county. In August 1957, Governor Patterson obtained an injunction[6] against the Tuskegee Civic Association for al-

[5] The validity of this Act is challenged in a case now pending on petition for certiorari. *Gomillion* v. *Lightfoot*, No. 668, this Term.

[6] *Alabama ex rel. Patterson* v. *Tuskegee Civic Association*, 2 Race Relations Law Reporter 1002; Circuit Court, Macon Co., Ala., No. 2157.

leged violation of the state boycott law because Negro members of the community ceased to purchase goods from white merchants, in protest against the legislature's actions. The court dissolved the injunction in June 1958 because of failure to prove that the Civic Association was directing a boycott.[7]

It is in the context of this history that the Congress enacted the Civil Rights Act of 1957. It is in the context of this history that the United States brought this action. And it is in the context of this history that the district court and the court of appeals concluded that the United States is powerless to vindicate the constitutional rights of American citizens in the face of the purported resignations of the registrars.

The decision below, if allowed to stand, could preclude enforcement of the basic right to vote whenever registrars resign or registration boards become inoperative. Such a result, we submit, cannot be reconciled with our concept of constitutional government, in which the States have a constitutional duty to establish an electoral process (Art. IV, Section 4, of the Constitution) providing an opportunity for qualified citizens to vote without distinction of race or color. The States cannot so easily divest themselves of their responsibilities by claiming the unavailability

[7] 3 Race Relations Law Reporter 719. Further examples of discriminatory practices in Alabama in the transportation and other fields, as well as voting, are set forth in the testimony and exhibits incorporated in the Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., pp. 825–870, 873–883, 900–930. And see *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.

of agents. The Fifteenth Amendment contemplates no such lapse; and Congress provided no such gap in the comprehensive remedial statute it enacted in 1957.

I

SECTION 1971(c) AUTHORIZES THE ATTORNEY GENERAL TO BRING INJUNCTION ACTIONS AGAINST THE STATE

There is clearly no constitutional bar to a suit by the United States against a State. See, *e.g.*, *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 332 U.S. 19; cf. *Monaco* v. *United States*, 292 U.S. 313. Thus, the question here is purely one of statutory construction: whether 42 U.S.C. 1971(c) authorizes the Attorney General to vindicate deprivations of voting rights in violation of the Fifteenth Amendment by a suit against the State itself. The court of appeals held that it would decide this question in the affirmative only if (1) jurisdiction for an action against a State was *expressly* conferred in the statute, or (2) "the language of the invoked statute carried the *necessary*, the *unavoidable* implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer" such jurisdiction (emphasis added) (R. 105). Applying that standard, the court found that the statute did not give the Attorney General authority to bring the action against the State of Alabama.

We submit that the test applied by the court of appeals in ascertaining the meaning of the statute was wholly erroneous; that its interpretation of the statute was incorrect; and that the legislative his-

tory, which the court apparently overlooked,[8] demonstrates that Congress intended the statute to be applied to the States.

A. THE STATUTE IMPLEMENTS THE FIFTEENTH AMENDMENT

It is important to emphasize that the statute here involved was designed to implement Congressional power under the Fifteenth Amendment. Under Section 1971(c) the Attorney eGneral has power to institute actions to vindicate the rights declared in subsection (a). The language and history of subsection (a)—which was passed substantially in its present form on May 31, 1870 (16 Stat. 140), just two months after the Fifteenth Amendment became law—demonstrate conclusively that its purpose was to restate and implement the Fifteenth Amendment. See *infra*, pp. 22–23; see also the Government's main brief in *United States* v. *Raines*, No. 64, this Term, pp. 39–45.[9] Insofar as subsection (c) was the enforcement provision of subsection (a), it, too, had the primary purpose of implementing the Fifteenth

[8] The court of appeals merely said, without elaboration: "we will state simply but categorically, that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that * * * congress tended to, or did, provide for suit against a sovereign state" (R. 105). The district court's conclusion concerning the intention of Congress rested upon the unsupported speculation that, since the Act was a compromise, "if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed" (R. 93).

[9] Copies of both our main and reply briefs in the *Raines* case have been served on opposing counsel.

Amendment. See *infra*, pp. 25–27; see also the Government's main brief in *Raines, supra*, at pp. 45–55.[10]

The Fifteenth Amendment's "command against such denial or abridgement [of voting rights] is directed to the United States and to the individual states." *Terry* v. *Adams*, 345 U.S. 461, 473 (opinion of Mr. Justice Frankfurter). It has never been seriously argued to the contrary. Problems raised by implementing legislation under this Amendment (and the Fourteenth Amendment)[11] have arisen when the legislation was not confined to state action or when individuals were seeking redress against state officials notwithstanding the bar of the Eleventh Amendment. See, *e.g.*, *James* v. *Bowman*, 190 U.S. 127; *Ex parte Young*, 209 U.S. 123. Indeed, in many of the early cases it was urged that the prohibitions and guarantees of the Fourteenth and Fifteenth Amendments were addressed to and controlled only the States themselves in their complete governmental capacity, and that federal power could be exercised only when the State acted as such. See, *e.g.*, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278; *Ex parte Virginia*, 100 U.S. 339. While that concept was rejected, the Court has never suggested that a State could not be reached under the Fourteenth or Fifteenth Amend-

[10] Subsection (c) also enforces subsection (b) which was an exercise of Congressional power under Art. I, Sections 2 and 4 of the Constitution.

[11] The issue would be the same under the Fourteenth and Fifteenth Amendments, because, insofar as the question of the amenability of a state to suit is concerned, there is no significant difference between the two Amendments.

ments. On the contrary, in the leading case of *Home Tel. & Tel. Co.* v. *Los Angeles, supra,* 227 U.S. at 286, this Court held:

> * * * the provisions of the [Fourteenth] Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, *of course, to the States,* but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted. [Emphasis added.] [12]

In sum, the Fourteenth and Fifteenth Amendments are addressed both to the States as entities and to persons acting "under color of state law." Surely, then, it is erroneous to suppose—as did the lower courts—that it may be presumed that Congress, when it manifests an intention fully to implement a constitutional provision which has two objects, does not intend to reach the primary object of that provision unless it

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[12] The Court further indicated that "the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, *provided against all and every such possible contingency.* Thus the completeness of the Amendment in this regard, but the complement of *its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed*" (emphasis added). 227 U.S. at 288.

specifically says so. Rather the presumption should be that, in fully implementing a provision reading "The right * * * to vote * * * shall not be denied * * * by any State * * *," Congress intended to make the implementing legislation applicable to the States.[13]

B. THE LANGUAGE OF THE STATUTE INDICATES THAT CONGRESS INTENDED TO REACH THE STATES

Aside from any presumptions which may be involved (see also *infra*, pp. 35–40), the statute itself indicates the intention of Congress to provide a remedy against discriminatory action by the States.

First, subsection (a), which was originally enacted in 1870, is itself declaratory of that Amendment. It provides that citizens of the United States otherwise qualified to vote shall be entitled to vote without distinction of race, color, or previous condition of servitude. For this reason, several members of Congress, during the 1870 debates on the original statute, felt that this provision was unnecessary because it merely restated the Fifteenth Amendment. See remarks of Senator Thurman of Ohio, 91 Cong. Globe 3485, and of Representative Kerr of Indiana, 92 Cong. Globe 3872. Moreover, the final clause of subsection (a), following the declaration of the right, provides that

[13] Other civil rights legislation, giving a right of action to private persons, cannot be construed to authorize suits against a State for the obvious reason that sovereign immunity and the Eleventh Amendment present insuperable obstacles to any other result. See *Peay* v. *Cox*, 190 F. 2d 123 (C.A. 5); *Cook* v. *Davis*, 178 F. 2d 595 (C.A .5); cf. *Tenney* v. *Brandhove*, 341 U.S. 367; *Peckham* v. *Scanlon*, 241 F. 2d 761 (C.A. 7).

the right is secure, any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause clearly suggests a purpose to implement the Fifteenth Amendment to the fullest extent, for it secures the right (1) against any custom, law or usage of the State itself, and (2) against any official acting "by or under [the State's] authority." Since subsection (c) of the Civil Rights Act of 1957, by its terms, was enacted as an enforcement provision for subsection (a), it must be assumed, at least in the absence of strong contrary evidence, that it was intended to enforce subsection (a) in its entirety—particularly when subsection (a) was itself reenacted in the 1957 Act. Certainly, it cannot be assumed that Congress, by providing a remedy for subsection (a), intended *sub silentio,* either to amend subsection (a) in order to narrow its application or to make the right guaranteed in subsection (a) secure only as against the action of particular officials, but not against the State itself.

Second, subsection (c), in providing for the enforcement of subsection (a), does not restrict the Attorney General's authority to seek preventive relief to "persons." It provides that "[w]henever any person * * * deprive[s] any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States * * * a civil action or other proper proceeding for preventive relief * * *." The authority to seek relief is therefore, by the terms of the statute, not confined to "persons." Unlike, for example, 42 U.S.C. 1983, which provides that every person who

deprives another person of rights shall be liable to the party injured, under 1971(c) the person's wrongdoing merely affords the occasion for the suit. Thus, the language of subsection (c) allows the Attorney General, on the basis of deprivations of voting rights by "persons" acting in the name of the State, to bring an injunctive action against the State itself, the judgment in which would be binding upon the persons committing the deprivation as well as all other persons acting for the State—that is, its "officers, agents, servants, employees, and attorneys." Rule 65(d), Fed. R. Civ. P. This is the only interpretation of subsection (c) which is fully consistent both with its language and with the intention of Congress to reach every situation within Congressional power under the Fifteenth Amendment.

C. LEGISLATIVE HISTORY

Even if the statutory reference to action or threatened action by "any person" were read into the provision authorizing preventive relief, the term "person," as used in this statute, should be taken to include a State. Only last Term the Court reiterated the rule to be applied as to whether a State is bound by federal statutory law. In *Sims* v. *United States,* 359 U.S. 108, 112, it was held that "whether the term person when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment * * *." And in *Plumbers' Union* v. *Door County,* 359 U.S. 354, 358, the Court stated that in determining whether a political body comes within the coverage of a statute the courts must seek to "effec-

tuate congressional policies * * *." Examined in the light of this standard, the legislative history of subsection (c) shows that Congress intended to authorize suits against a State.

1. Congress intended to prevent unlawful interference with the right to vote from any source

The legislative history of the Civil Rights Act of 1957 demonstrates a conscious and deliberate effort on the part of Congress to employ its powers fully to protect and secure the constitutional right of American citizens to vote.

In the House and Senate committee hearings, prominent witnesses, testifying both for and against the Act, clearly indicated their understanding that the proposal was a broad one which would comprehend actions against a State. Attorney General Brownell, speaking as the representative of the Executive, described the provisions in question "as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area." Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 25. And Attorney General Patterson of Mississippi, in opposing the bill, characterized it as giving the Attorney General of the United States the authority to secure "an injunction against the people of the whole State." He also observed that "such broad and sweeping authority conferred upon the Department of Justice * * * can be exercised and brought to bear upon the States of New York and California as well as upon the people of Mississippi and Georgia."

Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 753. See also statement of Honorable Robert E. Jones of Alabama, *id.* at p. 796. Mr. Davis Grant, Assistant Attorney General of Texas, commented: "Thus you could have the State pitted against the Federal Government. This would most certainly result in a sharper conflict than an action against a private individual ever would." Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 448.

Similarly, the House Judiciary Committee, where the Act originated, stated in identifying the power of Congress to act, that "the 15th Amendment denies the right *of any state* to abridge or deny the right to vote because of race, color, or previous condition of servitude" [emphasis added]. H. Rep. No. 291, 85th Cong., 1st Sess., pp. 6, 12–13. Subsequently, the Report explained how this power was exercised by the Act (*id.* at pp. 12–13):

> * * * The right of franchise must be protected by the sovereign if representative government is to be maintained. Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right *against any and all unlawful interference. That the proposal of this section does that very thing is clear.* Nothing contained in the proposal in any way infringes upon the power given to the States under the Constitution to fix the qualifications of the voters. It must be remembered that such power, however,

> is not unlimited, as indicated by the express power given to Congress to regulate the manner of conducting elections as well as by the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations. [Emphasis added.]

Throughout the debates there were repeated references to the fact that Congress was attempting to give full meaning to the prohibitions of the Fifteenth Amendment. Thus, Senator Bush, quoting in part from earlier remarks by Senator Bricker (103 Cong. Rec. 13138), stated:

> "The bill before the Senate deals with just one substantive right—the right to vote. It is the duty of the Congress to exert its *full power* under the 15th amendment to secure and protect that right." [Emphasis added.]
>
> * * * * *
>
> That is the central purpose of this bill: To give meaning to the 15th amendment of the Constitution of the United States.

See also remarks by Senator Purtell (103 Cong. Rec. 13328); Representative Celler, chairman of the House Judiciary Committee and a co-author of the bill (*id.* at p. 16088); and Representative Doyle (*id.* at p. 9390).

Indeed, the debate in Congress with respect to the reach of the Act centered, not on the application of the Act to a State—for that was generally assumed—but rather on the question of its applicability to private individuals. The exchanges concerning Part III of the bill between Senators Long, Cooper, and Javits

illustrate this point."[14] Senator Long contended that, while under Senator Cooper's view of the bill, the Attorney General could proceed only against "a State or against State authority or State board" (103 Cong. Rec. 12081), Attorney General Brownell apparently wanted authority under this section to bring suit on behalf of school boards to prevent private persons from interfering with the school board's decision to desegregate. This, to Senator Long, was not a "suit against a State" (*ibid.*), but rather one against private individuals. Senator Javits, a principal spokesman for the bill in the Senate, answered that individuals might also be proper parties to a suit, emphasizing that under the bill the jurisdiction of the court was occasioned by what the state agency did or should have done, and that such jurisdiction was "not affected by the persons who may be sued" thereunder. *Ibid.* Senator Cooper likewise stated that an individual might be a proper party if he attempted to block

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[14] Part III of the bill—which would have authorized the Attorney General to bring an injunction action when paragraphs 1, 2, and 3 of 42 U.S.C. 1985 were violated—was not enacted. The language, however, of Part III is identical in all respects relevant here to 1971(c):

> Whenever any persons have engaged or there are reasonable grounds to believe that any persons are about to engage in any acts or practices which would give rise to a cause of action pursuant to paragraphs First, Second, or Third, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceedings for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

an action properly begun to enforce a right, but that before the Attorney General could bring an action the State in some way must be denying the right. And he emphasized that (*id.* at p. 12082):

> It title III should become law, he [the Attorney General] could not file an action upon behalf of an individual or class of citizens unless the State—my State of Kentucky, the State of Louisiana, the State of New York, the State of Colorado, or any other State, or its officials acting under cover of law—were attempting to prevent a person from voting.

Senator Case of New Jersey agreed with Senator Cooper since the Fourteenth and Fifteenth Amendments apply only to activities of States and their subdivisions. *Ibid.*

In another portion of the debate, Senator Javits again stated (103 Cong. Rec. 12077):

> But obviously the gravamen of any proceeding under which the Attorney General is going to participate within any State will be the fact that the State has not done what it is supposed to have done under the State's own laws. Otherwise there is no measure of protection. * * *

The debates thus make it clear that there was no question of the binding applicability of the Act to a State; this was assumed by proponents and opponents alike. The only question was the extent to which private persons could or would be bound.

The contrary view of the district court was based on its conclusion that the "Civil Rights Act of 1957 was a compromise measure and the compromise reflected an

intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field" (R. 93). Of course, the Act was a "compromise." Few congressional enactments could not be so characterized. The areas of compromise, however, did not involve the issue here presented. On the contrary, the elimination from the bill of Part III (see *supra*, p. 28, note 14), involved only the issue of whether the Attorney General would be given power to seek preventive relief to protect rights other than voting, not whether there would be a limitation placed on his power in the voting field. The other major compromise, concerning the so-called jury trial amendment, involved only whether, after a judicial order had been obtained, a person violating that order would be entitled to trial by a jury in a criminal contempt proceeding. See 103 Cong. Rec. 16087–16088. But the authority contained in subsection (c) (Part IV of the Act) was at no time the subject matter of a compromise and, in the words of Representative Keating, one of the two authors of the bill, was left "intact." 103 Cong. Rec. 16087.

In short, the legislative history of the Act simply does not warrant the inference that the State is exempt. Throughout, it is clear that a principal assumption underlying the Act is the State's continuing responsibility for the wrongful conduct of its officials. Thus, the legislative history compels a conclusion that Congress never doubted that the States were bound by the Act to the extent that, under the Fifteenth Amendment, it could bind them.

2. Congress specifically intended to remedy situations resulting from the resignation of voting registrars

Congress was not merely concerned with the general proposition that the right to vote was to be protected against any and all interference which could be remedied under its Fifteenth Amendment powers, but it specifically considered the problem of voting rights in situations where local registration officials had resigned. Attorney General Brownell testified during the Senate committee hearing that the proposed bill would provide the only effective remedy for situations such as these existing in Macon County. Referring to the situation there, he stated that it was a shocking situation where "the voting rolls are frozen for the purpose of maintaining discrimination based on color." [15] Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 79. The next day, in response to Senator Ervin's complaint that the bill completely nullified state administrative remedies, Mr. Brownell replied (*id.* at p. 189):

> I don't think that presents the right picture. You take for example the Tuskegee case that I gave yesterday. There they have not convened the election board for years, so that many of

[15] The particular reference was to a complaint received from Macon County, Alabama, which detailed that there was no registration board and that the state appointing agency had failed to fill the vacancies even though a petition had been made to the governor (who is a member of the appointing board). Senate Hearings, *op. cit. supra*, at pp. 78–79; see also *id.* at p. 205; Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., pp. 681, 1032.

> the eligible voters just can't get the board to convene to accept their registrations. There is a case where your State administrative remedies are for all purposes a dead letter and nobody would be interfering with them. They died of their own accord. This would give the only practical avenue that we can see for protecting the constitutional rights of the citizens there.

In the debate in the Senate, Senator Case of New Jersey detailed several methods employed by the States which had frustrated the existing remedies, among them the resignation of the local registrars. Alluding to the situation in Bullock County, Alabama, he presented to the Senate the facts involved in *Sellers* v. *Wilson*, 123 F. Supp. 917 (M.D. Ala.), where the court had found unconstitutional discrimination by local voting registrars, and had nevertheless granted no relief because the registrars had resigned (103 Cong. Rec. 13321–13322):

> Mr. President, this is the type of thing that we are talking about, stated in black and white in court decisions. It does not happen by accident that less than a quarter of the Negroes in the Southern States have the right to vote.
>
> Not only are the existing remedies proved to be inadequate by the facts, but the States in the South are trying to make the existing remedies even harder to be availed of by the passage of barratry statutes, under which no person without a direct personal interest in a suit may in any way assist a plaintiff attempting to secure his legal rights to vote.

* * * * *

> The remedy, already inadequate, is being made more so by the very people who oppose this mild, moderate, and reasonable bill. Mr. President, the additional remedy provided by this proposed legislation is absolutely essential.
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> * * * * *
>
> The 15th amendment provides that Congress may provide by appropriate legislation for the enforcement of the voting rights of citizens, under that amendment. And, as the Senator from Ohio [Mr. Bricker] so well pointed out the other day, the power of Congress in this regard is plenary.

Near the end of the debate in the Senate, Senator Javits cited the situation existing in Macon County, Alabama, as one which particularly needed remedying by enactment of the bill. He cited that for an extended period there was then—as now—no functioning registration board in Macon County (103 Cong. Rec. 13732):

> There is and has been a major denial of both voting rights and jury service to Negroes in Southern States, particularly in the Deep South, and I am convinced it is going on right now. The controversy regarding the systematic denial of voting opportunities to Negroes residing around Tuskegee Institute coupled with the gerrymandering of the whole area, when at long last the white light of publicity threatened to get the Negroes the vote in Tuskegee, is itself current and strong proof of these assertions.
>
> On that subject, the press had an opportunity to interview two representatives from

that community, and they gave some very interesting and up-to-date figures. They showed that of some 14,530 Negroes in Macon County, 21 years of age or over, in 1950, only about 1,100 are registered, and they gave the following figures to buttress their position for the years 1951 to 1954, inclusive:

In 1951, 161 Negroes made application, and only 23 received certificates of registration.

In 1952, 225 Negroes made application, but only 52 received registration certificates.

In 1953, 182 Negroes made application, but only 28 received registration certificates.

In 1954, 456 made application, but only 167 received registration certificates.

During those 4 years, 1,024 made application to become voters, but only 270 of them were registered.

Then, Mr. President, we come upon an 18-month period when no one could register because there was no board of registry; that situation was allowed to continue during that time.

When we compare the registration of Negroes in that county with the registration of white persons, and the difficulty of registration by Negroes with the ease of registration by the white people, the contrast becomes all the more marked and the statements of fact become all the more confirmed, namely, that there is, and has been, in that area direct and outright discrimination on grounds of color in affording voting rights in Macon County, Ala.

The legislative history thus shows that the Act not only had a broad remedial purpose, but that it

was specifically considered flexible and comprehensive enough by Congress to cover the particular situation in Macon County. Certainly, the Act cannot reasonably be construed so narrowly as to exclude remedying the disenfranchisement of a large segment of a county's citizenry by a method which was specifically called to the attention of Congress as one of the evils which the Act was designed to correct.

D. THE STATUTE IS REMEDIAL

Even if it be assumed, *arguendo,* that the Congress did not wholly make clear its intention to include the States within the scope of the Civil Rights Act of 1957, that result would still follow from the obvious remedial purpose of the statute. The Act seeks to remedy interference with and deprivation of a basic constitutional right—the right to vote. It is well established that remedial statutes of that type are to be interpreted liberally and that, in the event that an ambiguity exists, they are to be read to include the sovereign.

The rules which have aided the courts in determining the applicability of statutes to the sovereign are deeply rooted in the common law. *Lord Berkley's Case* (1562), where the question involved the binding applicability of the statute *de donis conditionalibus* to the king, appears to be the earliest crystallization of the rule. Plowden's Reports, p. 223, 75 Eng. Rep. 339. While the court was split as to the proper rule to be applied, the king was held to be bound by the statute. Weston, J., stated that the statute did

not bind the king for he was not expressly named; Anthony Brown, J. held that the king's prerogative did not allow him to do injury to another and that, even assuming that the rule announced by Weston, J. applied, the king was sufficiently named; and Dyer, C. J., held that the king was bound though not named since the king is exempt from a statute which prevents abuses and wrongs only if it is shown that the lawmakers intended to permit the king to violate the intent of the statute. The view of the Chief Justice was subsequently followed in the *Magdalen College Case* (1616), Coke, Part XI, p. 66b, 77 Eng. Rep. 1235, and it found eloquent acceptance in the House of Lords in *The Case of Ecclesiastical Persons* (1602), Coke, Part V, p. 14a, 14b, 77 Eng. Rep. 69:

> In divers cases the King is (b) bound by act of parliament, although he be not named in it, nor bound by express words (A). And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named; for religion, justice, and truth are the sure supporters of the crowns and diadems of kings. * * *

Thus, Bacon's *Abridgment of the Law* summarizes the rule as follows: [16]

> * * * where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong,

[16] Bacon's *Abridgment of the Law, Prerogatives* (Bouvier ed., 1852), p. 92.

> the king shall be bound by such act, though not particularly named therein.
>
> But where a statute is general, and thereby (a) any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, (b) unless the statute is made by express word to extend to him.

The English rule in both its aspects was incorporated into the American system of jurisprudence. Bacon's statement of the common-law rule was cited with approval by this Court in *United States* v. *Knight*, 14 Pet. 301, 315, and *United States* v. *Herron*, 20 Wall. 251, 255. See also *People* v. *Herkimer*, 4 Cowen 345 (N.Y.). More recently in *Nardone* v. *United States*, 302 U.S. 379, 384, the Court again held that it is a "well recognized principle * * * that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." See *Sims* v. *United States*, 359 U.S. 108; *California* v. *United States*, 320 U.S. 577; *United States* v. *California*, 297 U.S. 175; *United States* v. *Rice*, 327 U.S. 742; *Ohio* v. *Helvering*, 292 U.S. 360.

This Court has also established general standards with respect to the problem of the construction of remedial statutes, which are fully applicable to the issue here. In *Stewart* v. *Kahn*, 11 Wall. 493, 504, the Court stated that if "[t]he statute is a remedial one * * * [it] should be construed liberally to carry out the wise and salutary purposes of its enactment." Similarly, in *Phillips Co.* v. *Walling*, 324 U.S. 490,

493, it was emphasized, in the context of the Fair Labor Standards Act, that:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

The court of appeals apparently relied on the second portion of Bacon's rule (*supra*, p. 37) —that a a statute which deprives the king of any prerogative, right, title or interest applies to him only if the statute expressly so provides. While the concept of royal prerogatives was naturally discarded in the United States, the exemption was retained with respect to the sovereign's role of *parens patriae* as protector of the public interest. See *United States* v. *Knight, supra,* 14 Pet. 301; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *Stanley* v. *Schwalby,* 147 U.S. 508; *Commonwealth* v. *Baldwin,* 1 Watts 54 (Pa.); *People* v. *Herkimer, supra,* 4 Cowen 345 (N.Y.). Any right, title, or interest which a State or the United States might hold as trustee for the people is presumed not to be divested by general words in a statute unless the sovereign is explicitly named or the statute carries an unavoidable implication to that effect. But to construe

the statute involved here as binding the State divests it of no interest which it holds as trustee for the people. Certainly, at least since the passage of the Fifteenth Amendment, the State has had no right or legitimate power to discriminate in voting on the basis of race or color.[17]

The statute involved here was obviously intended to have a broad remedial purpose. Thus, it calls for interpretation consistent with the standards laid down by this Court requiring that such statutes include the sovereign within their general language and that they be liberally construed. In fact, it is difficult to imagine a more cogent case in which such a construction is demanded since the substantive right to be protected is not merely one conferred by Congress, but is a basic democratic right guaranteed by the Constitution itself. See *Ex parte Yarbrough,* 110 U.S. 651, 665.

Interpreting subsection (c) to allow the Attorney General to bring actions against the State would clearly effectuate the broadly remedial provisions of the statute. An injunction against the State would bind all state officials affected thereby. Moreover, while the State is a proper party within both the language and remedial purpose of subsection (c), we submit that in the instant case

[17] Moreover, the States have never had a right to assert any sovereign immunity in a suit brought by the United States. See *supra*, p. 18.

the State is, in fact, a necessary and essential party for the effectuation of the Act. Unless the Attorney General can bring an action under subsection (c) against the State—which, in fact, bears responsibility for the discrimination charged—the purpose of the Act will be totally defeated by the simple expedient of the resignation of voting registrars and the refusal of state officials to appoint replacements.[18]

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[18] If, as we contend, the district court had jurisdiction to entertain the injunction action involved here, the court had the usual broad powers of equity to carry out its decree. Not only would the injunction be binding on any registrars appointed in the future under Rule 65(d), but, we submit, the court has power to require the State, through appropriate officers and agents, to enforce its voting laws consistent with the Constitution. Cf. *Ex parte Peterson*, 253 U.S. 300, 312:

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. * * *

See also *Porter* v. *Warner Co.*, 328 U.S. 395; *Dupont* v. *Dupont*, 242 Fed. 98, 137–138 (D. Del.); *Bartlett v. Gates*, 118 Fed 66, 71–72 (D. Colo.); *English* v. *Cunningham*, 269 F. 2d 517 (C.A D.C.), certiorari denied, 361 U.S. 897, 905.

II

THE INDIVIDUAL DEFENDANTS WERE PROPER PARTIES IN THIS ACTION

Whether or not the State is a proper defendant in an injunction action brought under Section 1971(*c*), we submit that the action was properly brought against the individual defendants. The district court and the court of appeals held, however, without relying on any decisions of the Alabama courts, that under the Alabama statutes the resignations tendered by the registrars had become effective and that therefore they were not proper parties to this action (R. 83–87, 107). Since this Court has frequently held that, save in exceptional circumstances, it will not review questions of state law which have been determined by the lower federal courts in the area (see, *e.g.*, *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 529–530; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237), we will assume, *arguendo*, for purposes of this case, the correctness of this ruling as to state law. Nevertheless, we submit that the resignations do not require the conclusion, under federal law, that the individual defendants could not properly be named as parties defendant in order to give effect to the rights secured by the Civil Rights Act.

A. EVEN IF THE REGISTRARS' RESIGNATIONS WERE NOT TENDERED IN BAD FAITH, THAT DID NOT PRECLUDE THE REGISTRARS FROM BEING NAMED AS PARTIES DEFENDANT IN SUITS UNDER THE CIVIL RIGHTS ACT OF 1957

We submit that the remedial purpose of the Act, and the broad powers conferred on the Attorney General

in subsection (c) to secure preventive relief, justify bringing an action against registrars who have themselves deprived citizens of the right to vote in violation of the Act and the Fifteenth Amendment, even though they have submitted resignations effective under state law, when the State has failed to appoint new registrars to take their place. Certainly, the important purposes of the Act cannot be defeated by the simple resignations of the registrars and the refusal of appropriate state officials to appoint new registrars—even assuming that such action was not taken in bad faith. In such a situation, the federal courts have ample power to effectuate the purposes of the Act by considering the resignations as ineffective for the limited purpose of holding the registrars as proper defendants under subsection (c), if the Act is construed, as it must be, to provide not only a right but an effective remedy.[19]

1. Federal law controls

It is, of course, well-established law that when, as here, the jurisdiction of the district court rests upon a federal substantive statute, the issues must ordinarily be determined by reference to federal law.[20] See, *e.g.*, *Dei-*

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[19] We assume, *arguendo*, in light of the holding of the courts below, that the individual defendants have no authority to act as registrars under state law. It does not follow, however, that authority to act may not be granted them by the court under its general equitable powers for the purpose of carrying out its decree. See *supra*, p. 40, note 18.

[20] The complaint (see R. 1) alleged that the district court had jurisdiction under the Civil Rights Act of 1957 (42 U.S.C. 1971(d)), which specifically confers jurisdiction on the federal courts in actions under the Act, and in addition, because of the

trick v. *Greaney*, 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 455–456. As Mr. Chief Justice Stone declared for this Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176:[21]

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins* * * *. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. * * *

In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, the Court stressed the necessity of applying federal law where the remedy for the federally created right is in equity:

> The present case concerns not only a federally-created right but a federal right for which the

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fact that the United States instituted suit (28 U.S.C. 1345). This Court has similarly held that federal law will also be applied, normally, where the federal court's jurisdiction is invoked by the initiation of the action by the United States, *Board of Commissioners* v. *United States*, 308 U.S. 343; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363.

[21] Although *Sola* was a diversity case, the issues were so dominated by the policy of the Sherman Act that the Court applied federal law derived from that policy. 317 U.S. at 176.

> sole remedy is in equity. * * * We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * *. [Citations omitted.] [22]

Applying these principles to the present case, it is clear that if the resignation of the registrars were controlled exclusively by state law, the policy of the federal statute would be set at naught and its benefits denied. Similarly, unless the law governing the effectiveness of resignations of state registrars is uniform insofar as their federal duties are concerned, a registrar in one state, who has illegally deprived other citizens of the right to vote, will be required, despite his purported resignation, to place such citizens on the

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[22] The question here must be distinguished from "capacity to be sued," and hence must be resolved without regard to Rule 17(b), Fed. R. Civ. P., under which the *capacity* of an officer of a state is determinable by the law of the state in which the district court is held. 3 Moore, *Federal Practice* (2d ed.) § 17.19. It is not disputed that Alabama state officers as such, including registrars, are suable. The issue here, rather, is whether the individual defendants should be considered state officers for purposes of determining whether they are subject to suit under the Act. Rule 17(b), furthermore, has been held inapplicable to non-diversity cases in which suit is based upon a federal statute. *Briggs* v. *Pennsylvania R. Co.*, 153 F. 2d 841, 842 (C.A. 2) (L. Hand, J.); *McCollum* v. *Mayfield*, 130 F. Supp. 112, 117 (N.D. Cal.); cf. *Roberts* v. *U.S. District Court*, 339 U.S. 844, 845.

registration rolls, while in another state a registrar under the same circumstances may avoid any responsibility for redressing the wrongs he has committed. It is clear that Congress could not have intended the effectiveness of its remedial statute to be dependent upon the accidents, or designs, of state law. Cf. *National Law Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124.

2. The appropriate federal rule

In choosing the proper federal rule to be applied in cases involving a federal statute, it is true that this Court has "occasionally selected state law." See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367; *Royal Indemnity Co.* v. *United States*, 313 U.S. 289. But where a uniform rule has been considered desirable in effectuating the federal purpose, the Court has disregarded state law (*Clearfield Trust Co.* v. *United States, supra; Deitrick* v. *Greaney, supra; D'Oench, Duhme & Co.* v. *F.D.I.C., supra*), particularly where the remedy for the federally-created right is in equity. *Holmberg* v. *Armbrecht, supra.* The rejection of state law does not result in a vacuum. The courts may not only "draw upon all the sources of the common law * * *," but may also resort to the Constitution, federal statutes, and their underlying policies. *D'Oench, Duhme & Co.* v. *F.D.I.C., supra*, 315 U.S. at 472 (Mr. Justice Jackson, concurring).

At common law, the acceptance of a public office was required, and a refusal to assume it was a crime. *Edwards* v. *United States*, 103 U.S. 471, 473; *The King* v. *Larwood*, 4 Mod. 270; *Rex* v. *Bower*, 1 Barn.

& Cres. 585; *State* v. *Ferguson,* 31 N.J.L. 107, 120. It followed as a corollary that an appointee, after assuming an office, could not resign without the consent of the appointing power. For a resignation to be complete, the consent of the appointing authority had to be manifested by an acceptance, either expressly by entry in the public books or impliedly by appointment of a successor. *Edwards* v. *United States, supra,* 103 U.S. at 474; Willcock, *Corporations,* p. 239.

Standing alone, however, the common-law rule is inadequate to govern resolution of the federal question involved here.[23] That rule was formulated to govern the relationship between an officeholder and a single sovereign. The responsibilities of the officeholder were owed exclusively to the public whose representatives had appointed him. It was reasonable to assume that such representatives, being responsible to the public, would not accept the officeholder's resignation if the public convenience would suffer thereby. No such assumption can be indulged where, as here, the officeholder's responsibility is not merely to the public whose representatives have appointed him, but

[23] If the common-law rule were applied to the facts of this case, the resignations of the individual defendants would be ineffective. Here, the record is barren of competent evidence of duly authorized acceptance. Nor were the resignations accepted by implication, since no successors have been appointed. Self-serving affidavits of the defendants assert that their resignations were "accepted" (R. 34, 36), but do not state *when* the alleged acceptances occurred, *i.e.*, whether before or after commencement of this suit, or *how* they occurred; thus, there is no evidence that the alleged acceptances were manifested by entry in the public books as required at common law.

also to a superior sovereign. The power to decide whether acceptance of the resignation will leave unprotected the interest of the superior sovereign cannot safely be entrusted to the appointing authority, which is not accountable to the nation in whose citizens the superior sovereignty resides.

Here, the registrars owe a duty not only to Alabama, but also to the United States. The basic source of the federal duty lies in the Constitution. The Fourteenth and Fifteenth Amendments, respectively, impose upon state officials a duty (1) not to deny to any person within the jurisdiction of the State the equal protection of the law, and (2) not to deny or abridge the right of citizens of the United States to vote on account of race, color, or previous condition of servitude. The latter duty under the Fifteenth Amendment is implemented by subsection (a) of the Civil Rights Act which the Attorney General is attempting to enforce in the action involved here. Furthermore, in guaranteeing to qualified voters within a state the right to cast their ballots and have them counted in congressional elections (*United States* v. *Classic*, 313 U.S. 299, 314, 315; *Wiley* v. *Sinkler*, 179 U.S. 58, 62; *Ex parte Yarbrough*, 110 U.S. 651, 663), the Constitution imposes upon state voting officials a duty not to deny or abridge the right. These duties, moreover, were explicitly assumed by the registrars when they subscribed, prior to taking office, to the oath required of them by the United States Constitution (Article VI, Clause 3), by Act of Congress (4 U.S.C. 101), and by the Alabama Constitution of 1901 (Art. 16, Sec. 279; see 17 Ala. Code 25).

The federal duty of voting registrars, notwithstanding their appointment by the State, is accompanied by a federal *status*. This Court has held that a state official may be so invested with a federal duty as to become a federal official for federal purposes. When a federal prisoner is placed in the custody of a state keeper, such keeper becomes, so far as the detention and treatment of that prisoner is concerned, a "keeper of the United States." *Randolph* v. *Donaldson*, 9 Cranch 75, 86; see also *Wilson* v. *United States*, 26 F. 2d 215, 216 (C.A. 8); *In re Morgan*, 80 F. Supp. 810, 817 (N.D. Iowa); *Ex parte Shores*, 195 Fed. 627, 630 (N.D. Iowa). Thus, at least with respect to federal elections, voting registrars act as agents of the United States, as well as of the State.

3. The rule to be applied here

Given the clear federal duty of the registrars to register qualified citizens for voting in federal and state elections without distinction of race or color, and the clear policy of the Civil Rights Act to hold responsible those officials who default in the performance of that duty, the resignations of the individual defendants should be considered as ineffective, under federal law, for purposes of determining their amenability to suit here. We urge that, for purposes of actions by the United States under the Civil Rights Act, the resignation of a state registrar alleged to have violated the Act is effective only upon the qualification of a successor. This rule is both reasonable and supported by precedent. It is the rule favored by this Court and

other federal courts in construing state statutes in diversity cases not involving a federal interest. Thus, in *Badger* v. *United States ex rel. Bolles*, 93 U.S. 599, this Court held, in a diversity case, that a writ of mandamus could be issued to city officials who prior to the filing of the petition for mandamus had purported to resign, as they had a right to do under local law, and whose resignations had been duly accepted in accordance with local law (*id.* at pp. 603, 601). This Court, however, in construing an apparently conflicting local statute which provided that the officials "shall hold their offices until their successors shall be qualified", held (93 U.S. 599, 602, 603):

> The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor.

In so construing the local statutes, the Court made clear that it was strongly influenced by a disposition to avoid a construction which would allow a hiatus in public office. *Id.* at pp. 604-605. Accord, *United States* v. *Green*, 53 Fed. 769 (W.D. Mo.); *United States ex rel. Watts* v. *Justices of Lauderdale County*, 10 Fed. 460, 466 (W.D. Tenn.).

We submit that the same consideration, coupled with the necessity of effectuating the vital federal policy expressed by the Civil Rights Act, requires adoption of the same rule here. It would frustrate the high purposes of the Civil Rights Act of 1957 to construe it as declaring a right but allowing violation of such right to go remediless. Where state registrars are alleged to have violated the Act, have resigned from office, and successors have not been appointed, it is entirely reasonable and consistent with the general principles of law discussed above, as well as the specific objectives of the Civil Rights Act, to hold that these registrars may nonetheless be named as parties defendant in order that the court may carry out the statutory mandate by providing effective relief. The precise manner in which such relief may be granted may vary with the necessities of particular cases; but certainly there is no lack of power in the federal courts to take such action as circumstances may require in order to give full effect to the rights involved.

B. THE REGISTRARS' RESIGNATIONS WERE CLEARLY INEFFECTIVE BECAUSE THEY WERE MADE IN BAD FAITH TO AVOID THEIR CONSTITUTIONAL DUTY OF REGISTERING VOTERS WITHOUT RACIAL DISCRIMINATION

If, despite our earlier contentions to the contrary, the Court should determine that qualification of a successor is not generally necessary to make a registrar's resignation ineffective for purposes of amenability to suit under the Civil Rights Act, the resignations in the instant case were nevertheless ineffective for purposes of that Act. The complaint in the instant case

alleged that the resignations had been submitted in bad faith, and these allegations, for purposes of the motion to dismiss, must be considered as proven. Such resignations submitted for the purpose of frustrating the enforcement of the Fifteenth Amendment and the Civil Rights Act should not prevent the registrars from being considered proper defendants in suits under that Act.

We have shown above (pp. 42–45) that federal law is applicable in cases, such as this one, brought under a federal statute, and that this law, in the absence of applicable federal constitutional and statutory provisions or policy, depends largely on common law. At common law, it was recognized that an attempted resignation by a public official, even though accepted, is not effective where it is submitted in order to avoid the performance of a specific and obligatory duty or merely to thwart litigation. See *Badger* v. *United States ex rel. Bolles, supra,* 93 U.S. at 604–605; *Thompson* v. *United States,* 103 U.S. 480, 482; *Edwards* v. *United States,* 103 U.S. 471, 473; *United States* v. *Green, supra,* 53 Fed. 769; *United States ex rel. Watts* v. *Justices of Lauderdale County, supra,* 10 Fed. 460; *People* v. *Keating,* 112 Colo. 26, 30–31, 144 P. 2d 992, 994; *People* v. *Barrett,* 365 Ill. 73, 82, 5 N.E. 2d 453. In *Keating,* the Colorado Supreme Court clearly stated the common-law rule and its rationale (112 Colo. at 30-31, 144 P. 2d at 994):

> The right of any public official to resign cannot be doubted; but when the resignation is * * * to avoid performing a specific duty

> in the interest of a party in whose behalf such official is legally bound to act, his resignation, however formally tendered and accepted, will be regarded as without effect. Otherwise, public officials, persistently and successively resigning their offices, could work the undoing of parties whose rights are dependent upon action by those officials. The law may not thus be mocked, nor will ministers of justice, to whom appeal is made for relief in such situations, fail to grant relief * * *.[24]

Accordingly, evidence of the motive of the official in attempting to resign is admissible to attack the effectiveness of the resignation. See *Thompson* v. *United States, supra,* 103 U.S. at 482–483; cf. *Edwards* v. *United States, supra,* 103 U.S. at 473.

The wisdom of the common-law rule is plain. 'In nullifying a resignation prompted by an intent to avoid the performance of a legal obligation, it is designed to hold public officials accountable for their actions. Similarly, the rule is fully consistent with

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[24] This rule follows logically from the broader principle that equity will not perpetuate a fraud. Thus, an officer of a corporation cannot avoid service of process upon him as a representative of the corporation by purporting to resign, even where the "resignation" is accepted. *Inventions Corp.* v. *Hobbs*, 244 Fed. 430 (C.A. 2); *Evarts* v. *Killingworth Mfg. Co.*, 20 Conn. 447, 457; see *Carnaghan* v. *Exporters' &c. Oil Co.*, 11 N.Y.S. 172, 175; cf. *Zeltner* v. *Zeltner Brewing Co.*, 174 N.Y. 247, 252–253, 66 N.E. 810; 2 Fletcher (1954 rev. vol.); *Cyclopedia Corporations*, § 345. The resignation of a corporate director is also ineffective if the interests of the corporation would thereby be left without proper care and protection. *Zeltner* v. *Zeltner Brewing Co., supra; Carnaghan* v. *Exporters' &c. Oil Co., supra;* 1 Morawetz, *Private Corporations* (2d ed., 1886), § 563.

federal law and policy, and its application is particularly imperative where the obligation sought to be avoided is one imposed by the Constitution.

In this case, the complaint alleged that the registrars had resigned for the purpose of avoiding their constitutional duty to register qualified Negroes (R. 4, 5):

> 12. *For the purpose of preventing Negroes from registering* the Registration Board did not perform its functions and duties for substantial periods of time. Such periods of time and such failure to perform its functions and duties have included the following:
>
> * * * * *
>
> (e) *From December 1958 to the present the Registration Board rendered itself inoperative by the purported resignation of its only two members.* [Emphasis added.][25]

This allegation of the complaint that the resignations of Livingston and Rogers were intended to prevent Negro registration was supplemented by the further allegations that, for the same reason, (1) the registration board (composed of Livingston, Rogers and one

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[25] As the complaint made clear, defendants Livingston and Rogers were the only members of the registration board as of December 1958 (R. 2, 5), and the purported resignations at that time were those of Livingston and Rogers (R. 3). And, as the district court found, "[i]t is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote" (R. 88).

other), had refused to convene from March 1957 to June 1957 (R. 4–5), and (2) previous members of the registration board had resigned or refused to convene (R. 4, 5).[26] See Report of the United States Commission on Civil Rights, 1959, pp. 75–76, regarding the technique of resignation by registrars as a device to thwart Negro registration and to frustrate federal investigation or action.

The individual defendants filed a motion to dismiss the complaint (R. 46) and affidavits stating that their resignations had been tendered in "good faith" (R. 33, 35).[27] The district court, apparently accepting

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[26] The complaint also asked the district court to enjoin the individual defendants from "[f]ailing and refusing, on the grounds of race or color, to convene and function as a board of registrars * * *" (R. 8).

[27] Both affidavits contained the following identical language (R. 34, 35–36):

> Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars.

The assertions of the defendants that they did not intend again to serve as registrars and that they have assumed other

these affidavits as conclusive, found that the resignations were, in fact, tendered in "good faith" (R. 87) and therefore dismissed the complaint against the individual defendants (R. 94).[28]

The district court's determination, we submit, was clearly erroneous. A complaint may not be dismissed without giving the plaintiff an opportunity to offer evidence supporting his allegations "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45–46; see, *e.g.*, *United States* v. *The White County Bridge Commission*, C.A. 7, decided January 11, 1960; *Seymour*

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public offices do not contradict the allegation of the complaint that their purpose in resigning was to prevent Negro registration. Moreover, the registrars, by stating in their affidavits that they had both resigned on the very same day (December 10, 1958), cast serious doubt upon the truth of their assertions that they had resigned in "good faith". Any contention that the simultaneous tender of the resignations was coincidental stretches credulity, especially since, as the district court stated, the "resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks" (R. 82).

[28] The court suggested that its disposition would have been different had it concluded that the resignations were tendered in bad faith (R. 87):

> Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

In so stating, the court implicitly recognized the force of the common-law rule nullifying the effect of resignations tendered by public officials for the purpose of avoiding their legal obligations.

v. *Union News Company,* 217 F. 2d 168 (C.A. 7). For purposes of a motion to dismiss, the material allegations of the complaint must be taken as admitted. See, *e.g., Clark* v. *Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480; 2 Moore *Federal Practice* (2d ed.), § 12.08. Nor can a district court properly dismiss a complaint on the basis of assertions in the affidavits filed in support of the motion to dismiss. "An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint." *Frederick Hart & Co.* v. *Recordgraph Corp.,* 169 F. 2d 580, 581 (C.A. 3); see, *e.g., Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620; *Farrall* v. *District of Columbia Amateur Athletic Union,* 153 F. 2d 647 (C.A.D.C.); 2 Moore, *Federal Practice* (2d ed.), § 12.09.

Since the allegations of the complaint must be accepted as true for purposes of the motion to dismiss, it is clear that the district court erred in dismissing the complaint against the registrars. The allegations of the complaint filed in this case stated a claim which, if proven, would have established not only that the attempted resignations themselves constituted discriminatory practices proscribed by the Fifteenth Amendment and the Civil Rights Act of 1957, but would have nullified the effect of the resignations for purposes of this suit.[29]

[29] Since the district court erred in finding good faith, its determination, based on that finding, that the resignations were effective under state law is likewise erroneous. The court did not expressly consider whether the resignations would have been effective under state law if made in bad faith, although it suggested the contrary. See *supra*, p. 55, note 28.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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